

**BOARD OF ENVIRONMENTAL REVIEW  
AGENDA ITEM**

**EXECUTIVE SUMMARY FOR ACTION ON RULE ADOPTION**

**Agenda # III.A.2.**

**Agenda Item Summary:** The Department requests that the Board adopt the proposed amendments to the water quality rules pertaining to concentrated animal feeding operations (CAFOs), in accordance with the revised federal regulations, and adopt Department Circular DEQ-9.

**List of Affected Rules:** This rulemaking would amend ARM 17.30.1303, 1322, 1330, and 1343.

**Affected Parties Summary:** The proposed rule amendments affect all CAFOs.

**Scope of Proposed Proceeding:** The Board is considering final action on adoption of amendments to the above-referenced rules and the adoption of Department Circular DEQ-9 as proposed in the Montana Administrative Register, with revisions to Circular DEQ-9 as noted in the attached draft Notice of Amendment.

**Background:** The state CAFO rules that are scheduled for final adoption incorporate revisions to the federal CAFO rules promulgated in 2003 by the United States Environmental Protection Agency (EPA). After publication of the Board's original notice of proposed rulemaking in this matter (MAR Notice No. 17-222), and after public hearing on that notice, a federal court of appeals vacated some of EPA's 2003 CAFO rule revisions. Waterkeeper Alliance, Inc., et al. v. EPA, 399 F.3d 486 (2d Cir. 2005). The court vacated provisions that (a) allowed permitting authorities to issue permits without reviewing the terms of nutrient management plans; (b) allowed permitting authorities to issue permits that did not include the terms of the nutrient management plans, and that did not provide for adequate public participation; and (c) required CAFOs to apply for discharge permits or otherwise demonstrate that they have no potential to discharge. After the court decision, the Board issued an amended notice of rulemaking (MAR Notice No. 17-233), in which it proposed to adopt Department Circular DEQ-9 as originally proposed, and to adopt the federal CAFO rules as originally proposed except for the provisions vacated by the federal court.

**Hearing Information:** A hearing on the original notice was conducted by Thomas Bowe on January 14, 2005. A hearing on the amended notice was conducted by Katherine Orr on November 25, 2005. Comments were received from interested parties. In response to comments, the Department has recommended that the rules be adopted exactly as proposed and that minor changes be made to Circular DEQ-9.

**Board Options:** The Board may:

1. Adopt the proposed rules and Circular DEQ-9 as set forth in the attached Amended Notice of Public Hearing on Proposed Amendments;
2. Adopt the proposed rules and Circular DEQ-9 with revisions that the Board finds

- are appropriate and that are consistent with the scope of the Amended Notice of Public Hearing on Proposed Amendment and the record in this proceeding; or
3. Decide not to adopt the rules or Circular DEQ-9.

**DEQ Recommendation:** The Department recommends that the Board adopt the proposed rules exactly as proposed in the Amended Notice of Public Hearing on Proposed Amendment, with minor revisions to Circular DEQ-9 in response to comments, as noted in the draft Notice of Amendment.

**Enclosures:**

1. Amended Notice of Public Hearing on Proposed Amendment
2. Presiding Officer's Report;
3. Draft Notice of Amendment;
4. Circular DEQ-9 (2005)